Opinion No. 63-49-L
R-144
March 28, 1963

REQUESTED BY: S. C. CORBITT
Director, Utilities Division Corporation Commission

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Is the Tucson Gas, Electric Light and Power Company legally authorized, under the Tucson City Ordinance, to charge and collect Tucson City sales tax on gas and electricity billed on the acounts of consumers living outside of the city limits of the city of Tucson?

ANSWER: See body of opinion.

Tucson is a home rule city and has the power to enact a business privilege license tax. Articles 9 § 1 and 13 § 2, Arizona Constitution; A.R.S. 9-240(B)(18); City of Tucson v. Walker, 60 Ariz. 232, 234, 135 P.2d 223 (1943); McCarthy v. City of Tucson, 26 Ariz. 311, 316, 225 Pac. 329 (1924); Terrell v. McDonald, 32 Ariz. 30, 255 Pac. 485 (1927); City of Glendale vs. Beatty, 45 Ariz. 327, 43 P.2d 206 (1935) and City of Phoenix v. Arizona Sash, Door and Glass Co., 80 Ariz. 100, 293 P.2d 438 (1956). Therefore, we will proceed directly to the question of whether or not the City of Tucson can impose its business license tax on business involving customers residing outside of the Tucson city limits.

Section 9 of the Tucson Business Privilege License Tax Ordinance No. 1850 entitled Levy of Tax and Purposes, states as follows:

> "Commencing September 1, 1958, there is hereby levied and shall be collected by the Tax Collector, for the purpose of raising revenue to be used to aid in paying the necessary and ordinary expenses of the City of Tucson, any indebtedness of the City of Tucson, and to reduce or eliminate the annual ad valorem tax levy on real and personal property in the City, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, in accordance with the following provisions and schedule:. . ."

This langauge used in Section 9 is almost identical to Section 6 of the City of Phoenix Privilege Tax Ordinance which was held to be a business privilege tax and not a sales tax in City of Phoenix v. Arizona Sash, Door and Glass Co. supra. See also Arizona State Tax Commission v. Ensign, 75 Ariz. 220, 223, 254 P.2d 1029, rehearing denied, (1953), where our Supreme Court held that a tax using similar language as in Section 9 of the Tucson Ordinance was a tax upon the privilege of engaging in business and was specifically not a sales tax.

See also the recent case of State Tax Commission v. Consumer Market, Inc., 87 Ariz. 376, 379, 351 P.2d 654 (1960), where our court ruled that our state privilege tax (A.R.S. § 42-1301 et seq.) " . . . is not a tax upon the sale of items of merchandise but is a tax upon the privilege of engaging in business measured by the gross income from sales." Consequently, Tucson Gas and Electric Company's charging their customers for a purported sales tax is in fact a passing onto their customers a charge owed by the electric company as is done with some other company expenses.

Section 9 of Tucson City Ordinance No. 1850 in part describes the following schedule for imposition of the tax:

> "2. At an amount equal to one fourth of one percent ($\frac{1}{4}$ of 1%) of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within the City of Tucson in the following businesses:"
>
> "(b) Producing and furnishing, or furnishing to consumers, electricity, electric lights, current, power or gas, natural or artificial, and water."

Section 9E entitled "Tax Computation Base" states:

> "For the purpose of computing any of the taxes imposed by this Section 9, it is hereby declared to be the express intent of this Chapter that the taxes therein imposed and levied shall be measured by as much of the volume of taxpayer's business and activities upon which to impose the tax as the City of Tucson has the power to tax except as provided to the contrary by this Chapter, or expressly exempted therefrom in this Chapter, whether such business be conducted wholly within the City of Tucson or partly within and partly outside the City of Tucson; this measure of taxable volume shall include the taxpayer's

business activities, enumerated in and specified by Section 9 of this Chapter, either within or outside of the City of Tucson, which partly arises within the City of Tucson, or are partly transacted or partly controlled within the City of Tucson, or are partly completed within the City of Tucson, and the gross receipts, gross income, and gross proceeds of sale arising or derived therefrom; provided however, that proceeds or income from a transaction shall not be included in taxpayer's taxable activities or taxable volume of business if the only portions of the transaction occurring within the City of Tucson are checking, accounting, and receiving payment." (Emphasis added).

The Official rules and regulations for Administration of Business Privilege License Tax, Part IV F, entitled, Conditions of General Liability to business privilege tax (business in and/or outside city) states:

"This subject is governed by the provisions of Subsection E. Section 9, Chapter 29, Code of Tucson (commonly called, "City Sales Tax Ordinance"). Many persons (as defined in ordinance Section1, Subsection 10, Chapter 29 Code) do business wholly within the boundaries of the City of Tucson, many do business both within and without the City, and many do business only outside the City. Subject to the other limitations, exemptions, restrictions, conditions and provisions of Chapter 29, Code ("City Sales Tax Ordinance"), Subsection E of Section 9, Chapter 29 Code of Tucson gives the formula and provides the general yardstick for determining the question of whether a specified business entity is liable to City "Sales Tax" or not.

1. Any persons who does business only in the City is liable for "Sales Tax" on the whoe volume of his business.

2. Any person who does business both in and outside City is liable for the tax on the whole volume of his business if that person, from within the City partly transacts and/or partly controls his business from within the City, including the "outside" business.

3. Any person who does business both inside and outside

of City but who does not supervise or control any part of the business from within the City is liable for a tax only on the business "inside" the City.

4. Any person who neither does business in the City or supervises or controls his business from within the City in part, is not liable for City "Sales Tax".

Merely keeping records, auditing, checking, or receiving payments within the City does not constitute "supervision or control", or "arising or transacting" within the meaning of the ordinance.

5. When in doubt about the application, construction, and meaning of Section 9E to any particular business, it is suggested that the City Tax Collector (City Treasurer) be requested to make a determination after the requisite facts as to operation are furnished him by the taxpayer.

Any such determination, so given, shall, in the absence of fraud or bad faith, relieve the taxpayer from all penalties and interest on amounts later added by audit, re-assessment, re-determination, or a change in such determination due to error or previously unknown facts relating to procedure and methods of doing business of the taxpayer.

The statement of facts and determination above referred to shall be in writing and shall be kept on file in the City Treasurer's office." (Emphasis added).

In examining the above quoted sections as a whole, it is apparent that Tucson City Ordinance No. 1850 explicitly provides for taxation of receipts arising from sales which occur outside the Tucson City limits, provided that the transactions relating to the out of city sales involve portions occurring within the City of Tucson to an extent greater than merely checking, accounting and receiving payment within the Tucson City limits. The explicit inclusion pertaining to sales which occur outside the Tucson City limits should be compared to the Phoenix business privilege tax which does not have such a specific provision as is contained in 9E of the Tucson City Ordinance No. 1850.

Therefore, our courts' holding in City of Phoenix v. Borden Company, 84 Ariz. 250, 326 P.2d 841 (1958), should not invalidate

the City of Tucson's imposition of its business privilege tax upon sales occurring outside the Tucson City limits. In the Borden case our Supreme Court noted that the City of Phoenix had not shown its intent to give its business privilege tax extra-territorial effect and that it was not the court's duty to reconstruct the language of the ordinance. The court consequently held that Phoenix could not tax income from business sales made outside the City of Phoenix, but the court did not dispute that Phoenix had the inherent power to pass a business privilege tax which would be levied on income from sales occurring outside as well as inside the city limits. In fact, in Arizona State Tax Commission v. Ensign, supra, our court ruled that the Arizona State Tax Commission could enforce taxes on sales to buyers residing outside the state of Arizona as well as to buyers inside the state, since the tax was a business privilege tax rather than a sales tax and was no undue burden upon inter-state commerce.

Other courts have upheld city business privilege taxes which taxes were imposed upon receipts from sales consummated by delivery of products to parties residing outside the city limits. Thus in Albright & Friel v. School District of Philadelphia, 187 Pa. Super. 387, 144 A.2d 745, 746 (1958), the Pennsylvania Supreme Court allowed the Philadelphia School District to impose a tax based on gross receipts for the privilege of engaging in business within a district even though the gross receipts were derived in part from sales accruing from out of city transactions. The court based its decision on the grounds that all of the company's operations were directed from the Philadelphia office and all administrative and executive activities were performed in the Philadelphia office and consequently within the territorial limits of the school district. There is no indication that the school district tax ordinance specifically provided for imposition of the tax upon extra-territorial sales. The tax merely stated in Section 3: ". . . Every person engaging in any business and any school district of the first class shall pay an annual rate of (1) mill of each dollar of the annual receipts thereof." Cf. dissenting opinion of Judge Phelps in City of Phoenix v. Borden Company, supra. See also General Foods Corporation v. City of Pittsburgh, 383 Pa. 244, 118 A.2d 572,575 (1955), where the Supreme Court held to be legally valid the business privilege tax on a wholesale grocer's gross receipts, arising out of sales involving delivery and transfer of the title of goods outside the city of Pittsburgh. The court emphasized that the sales orders were accepted inside Pittsburgh in a taxpayer's office. The Pittsburgh office registered the sales and billed the customers. Such acceptance and billing was enough for Pittsburgh to impose its gross receipts

tax on the out-of-city sales. Cf. Section 9E of Tucson City Ordinance No. 1850 which required more than merely checking, accounting and receiving payment within the City of Tucson in order that Tucson business privilege tax may be imposed on out-of-city sales. The tax involved in the General Foods Corporation case supra, was a tax on the annual volume of business done by every person engaged in the City of Pittsburgh in the occupation or business of vendor or dealer in goods, wares and merchandise. See also Standard Brands, v. School District of Pittsburgh and City of Pittsburgh, 403 Pa. 590, 170 A.2d 568, 570 (1961), and Rath Packing Company v. City of Pittsburgh 404 Pa. 36, 171 A.2d 42, 44 (1961).

For further authorities upholding the right of a city to impose a business privilege tax on the sales occurring beyond its city limits, see: Bentley-Gray Dry Goods Co. v. City of Tampa, 137 Fla. 541, 188 So. 758, 765-763 (1939), City of New Orleans v. W. Horace Williams Co., 212 La. 831, 33 So.2d 653, 654-655 (1947) and Great Atlantic & Pacific Tea Co. v. City of Richmond, 183 Va. 931, 33 S.E.2d 795, 804 (1945).

Therefore, it is the opinion of this office that the City of Tucson can legitimately impose its business privilege tax upon gross receipts of the Tucson Gas and Electric Company from sales occurring outside Tucson City Limits as well as inside Tucson City Limits provided that in fact the portions of the out-of-city transactions occur within the City of Tucson to an extent more than checking, accounting and receiving payment.

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